HIEW MIN CHUNG

v.

BORNEO HOUSING MORTGAGE FINANCE BHD & ORS

HIGH COURT SABAH & SARAWAK, TAWAU
RICHARD MALANJUM J
[ORIGINATING SUMMONS NO: 1-1999]
14 JUNE 2000

LAND LAW: *Sale of land - Bare trust, concept of - Whether developer becomes bare trustee of purchaser under sale & purchase agreement - Memorandum of transfer in escrow*

LAND LAW: *Charge - Priority - Whether bank entitled to take property as security with knowledge of equitable interest in property by third party*

The 2nd defendant ('HFR') was the property developer of a housing estate. By a sale and purchase agreement, one Hiew Min Chu & Sons Sdn Bhd purchased from HFR one unit of a shop-house. No memorandum of transfer was executed by HFR in favor of the purchaser or its nominee.

HFR proceeded to apply and obtained a bridging loan from the 1st defendant, Borneo Housing Mortgage Finance Berhad ('BHMFB') by way of creation of three charges on the said land that were duly registered on 15 February 1986 ('the charges').

By a separate sale and purchase agreement the purchaser sold the said property to the plaintiff. HFR defaulted in its payment for the bridging loan and went into receivership. As a result thereof BHMFB has proceeded to commence action to enforce the charges duly encumbered on the said land which are now subdivided into various lots. The plaintiff opposes the action.

The plaintiff argued that HFR was a bare trustee for the purchaser at the time of the creation of the charges and hence had no title, right or interest whatsoever in the said property to create the charges in favour of BHMF; and that BHMF had actually notice of the interest of the purchaser who is the plaintiff's predecessor and thus it would be unconscionable in equity for it to have taken the said property as part of the security for the charges.

Held:

[1] Since it is not in dispute that there was no memoranda of transfer executed in connection with the two sales of the said property the inevitable conclusion is that the doctrine of bare trustee is yet to be attained.

[2] The court is inclined to agree with 1st defendant that the least the vendors could have done in this case was to execute the memoranda of transfer in escrow regardless of the fact that the subdivision was yet to be carried out.

[3] The relationship of the plaintiff with the purchaser and the relationship between the purchaser and HFR are contractual in nature. There is no merit in the plaintiff's contention to have the charges declared null and void.

[4] In this case the solicitors acting for the parties may or may not be from the same firm at the material time. Therefore the plaintiff could not rely on the principle of knowledge of a solicitor to be imputed upon the client.

[Plaintiff's application dismissed.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal [1995] 3 CLJ 639 ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 ***(refd)***

Karruppiah Chettiar v. Subramaniam [1971] 2 MLJ 116 ***(refd)***

Ong Chat Pang & Anor v. Valiappa Chettiar [1971] 1 MLJ 224 ***(refd)***

Peninsular Land Development Sdn Bhd v. K Ahmad [1970] 1 MLJ 149 ***(refd)***

Southern Estate Sdn Bhd & Anor v. Tractors Malaysia Bhd [1996] 4 CLJ 344 ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 ***(refd)***

For the plaintiff - Liew Chiew Chai; M/s CC Liew & Co
For the 1st defendant - John Lee Tsun Vui; M/s Vincent Wong & Co
For the 2nd & 3rd defendants - Jolita Ijom
For the 4th defendant - Mohd Amin Tenreng

Reported by Yow Ting Fong

JUDGMENT

Richard Malanjum J:

By way of an originating summons dated 30 January 1999 (encl. 1) the plaintiff prays for the following relief, to wit,:

(a) For an Order that the Memoranda of Charge under Memorial Nos. 30195392, 30195391 and 30195393 registered against the title deed numbered CL 105477076 (Parent Title No. CL 10544787) be set aside;

(b) For an Order of Declaration that the Memoranda of Charge under Memorial Nos. 30195392, 30195391 and 30195393 are null and void;

(c) For an Order that the charge under Memorial Nos. 30195392, 30195391 and 30195393 be vacated from the original and the issue copy of the title deed numbered CL105477076;

(d) For an Order that the Registrar of Titles do vacate the charge under Memorial Nos. 30195392, 30195391 and 30195393 from the Register of Charge;

(e) The costs of this application be borne by the 1st Defendant; and

(f) Such other reliefs as this Honourable Court may deem fit.

The application is supported by the affidavit of Hiew Min Chung affirmed on 28 January 1999 (Hiew's 1st affidavit) and a subsequent affidavit in reply of Hiew Min Chung affirmed on 23 March 1999 (Hiew's 2nd affidavit).

The defendants, in particular the 1st defendant, are resisting the application. The 1st defendant filed an affidavit in reply affirmed by Lim Fong Mee on 12 February 1999 (Lim's 1st affidavit) and a further affidavit in reply also affirmed by Lim Fong Mee on 27 March 1999 (Lim's 2nd affidavit).

There is no serious dispute on the background facts of this case. Briefly, the 2nd defendant, namely, Hiew Fook Realty (Holdings) Sdn. Bhd. (HFR) was the property developer of a housing estate known as Taman King Fook (the said Taman) which comprised of terraced shop houses and dwelling houses on a parcel of land with parent title no. CL 105344787 (the said land). By a sale and purchase agreement dated 24 October 1983 one Hiew Min Chu & Sons Sdn. Bhd. (HMC Sdn. Bhd.) purchased from HFR one unit of shop-house in the said Taman described as Lot 7C and otherwise known as No. 1289, Taman King Fook, Jalan Utara, Tawau (the said property). The full purchase price was paid on 24 October 1983. But no memorandum of transfer was executed by HFR in favour of HMC Sdn. Bhd. or its nominee.

Subsequently, HFR proceeded to apply and obtained a bridging loan from the 1st defendant, Borneo Housing Mortgage Finance Berhad (BHMFB) by way of creation of three charges on the said land that were duly registered on 15 February 1986 (the charges).

By a sale and purchase agreement dated 2 July 1991 HMC Sdn. Bhd. sold the said property to the plaintiff for a purchase price of RM80,000.

HFR defaulted in its payment for the bridging loan and in fact went into receivership. As a result thereof BHMFB has proceeded to commence action to enforce the charges duly encumbered on the said land which are now subdivided into various lots. The plaintiff opposed the action and hence this present application.

In advancing the case for the plaintiff learned counsel submitted two points, namely, that the 2nd defendant, HFR, was a bare trustee for HMC Sdn. Bhd. at the time of the creation of the charges and hence had no title, right or interest whatsoever in the said property to create the charges in favour of BHMF; and that BHMF had actual notice of the interest of HMC Sdn. Bhd. the plaintiff's predecessor, on the said property and thus would be unconscionable in equity for it to have taken the said property as part of the security for the charges.

For the defendants, in particular the 1st defendant, it was contended that the principle enunciated in the case of *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd.* [1996] 2 CLJ 561 should apply. In that case his Lordship Edgar Joseph Jr. FCJ accepted the principle that for the doctrine of bare trustee to set in two conditions must be met, namely, that the full purchase price for the property must have been paid and that the vendor must have given to the purchaser a duly executed valid and registrable memorandum of transfer.

And in respect of the issue of actual notice learned counsel for the defendant submitted that fraud was not clearly alleged in the affidavits filed for the plaintiff and that even if alleged it was not proved beyond reasonable doubt as required by law. He further contended that there was no evidence adduced that there was deliberate collusion between the 1st and 2nd defendants and that mere knowledge of the unregistered interest of HMC Sdn. Bhd. in the said property did not amount to fraud by the 1st defendant. It was also denied that the 1st defendant had knowledge of the purchase of the said property by the plaintiff from HMC Sdn. Bhd. since it was never communicated to the 1st defendant and was there any assignment of the same to the plaintiff.

In response to the above contentions learned counsel for the plaintiff argued that this present case should be distinguished from that of *Time Engineering*'s case *(supra)*. It was the contention of learned counsel that before *Time Engineering*'s case there was another line of authorities whereby it was held that equitable ownership passed to a purchaser from a vendor at the point of full payment of the purchase price only. Several cases were cited such as *Peninsular Land Development Sdn. Bhd. v. K Ahmad* [1970] 1 MLJ 149; *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 and *Karruppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116.

And according to learned counsel *Time Engineering*'s case *(supra)* was also preceded by several cases such as *Ong Chat Pang & Anor v. Valiappa Chettiar* [1971] 1 MLJ 224 as well as *Karruppiah Chettiar*'s case *(supra)* particularly in the judgment of Gill FJ (as he then was).

It was urged that this court should not strictly follow *Time Engineering*'s case *(supra)* as it was not the intention of that case to lay down a rigid rule whereby 'in ALL CASES there must be in existence a duly executed, valid and registrable memorandum of transfer. The judgment has not gone so far as to suggest that the presence of a duly executed, valid and registrable memorandum of transfer is inevitable for the doctrine to operate, even in cases where such a step is practically impossible to be carried out by the vendor in the circumstance of the case.'

Basically, it was the contention of learned counsel that in a case as the present one where there was no subdivision of the parent title at the material time, the requirement of the execution of a valid and registrable memorandum of transfer should not arise.

In view of the diverse contentions it is essential to examine the full length and breath of the judgment in *Time Engineering*'s case.

Briefly the fact of that case is quite straightforward. And I think it will be adequate if I reproduce the head-note as reported thus:

> In March 1982, United Lands Development Sdn Bhd ('the developer') applied to the appellant ('the finance company') for a bridging loan ('the loan') to finance its industrial development project on four pieces of land in Sabah. By a sale and purchase agreement dated 2 November 1982 ('the agreement') entered into between the respondent ('the purchaser') and the developer, the purchaser agreed to purchase from the developer an industrial building to be built on one of the lands ('the property'). On 28 May 1983, the developer created a charge over the lands ('the charge') duly registered under s. 104 of the Sabah Land Ordinance (Cap 68) ('the Land Ordinance') in favour of

the finance company to secure the repayment of the loan. By 23 May 1986, the purchaser had paid the full purchase price thereby effecting completion of the contract of sale on that date. The developer later defaulted in repayment of the loan, and the finance company commenced proceedings to enforce the charge. Consequently, on 17 August 1991, an order for sale was made, and on 30 November 1991, the property was sold to Karamunsing Jaya Sdn Bhd ('the purchaser of the judicial sale'), and a certificate of sale dated 26 February 1992 was duly issued. On 7 December 1991, the purchaser commenced proceedings by way of originating summons seeking, *inter alia*, declarations that: (i) the developer was a bare trustee for the purchaser in connection with the sale of the property by virtue of the agreement; (ii) the finance company's charge before the subdivision over the four pieces of land, as far as the property which now had a sub-divided title was concerned, was null and void on the ground that the developer no longer had any chargeable interest over the property to create a valid charge in favour of the finance company, so that any foreclosure actions taken by the finance company over the property was wrongful; alternatively (iii) the finance company's charge was subject to the purchaser's prior equitable interest over the property acquired by the purchaser by way of the purchase of the property from the developer prior to the execution and registration of the finance company's charge; and (iv) any foreclosure action resulting in a sale by the finance company over the property was subject to the purchaser's prior equitable interest over the property. On 25 April 1994, the judge pronounced judgment in favour of the purchaser. It was held that the developer had become a bare trustee of the property for the purchaser on receipt of the full purchase price, and that the trusteeship operated 'retrospectively by conversion to the date when the contract (was) made', ie, 2 November 1982. The finance company appealed.

In his illuminating judgment his Lordship Edgar Joseph Jr. FCJ went on to discuss, *inter alia*, all the cases relating to the application of the concept of bare trustee. And his Lordship held that in so far as the Sabah Land Ordinance (the ordinance) is concerned it is a form of modified Torren system wherein registration of title is also of paramount importance. At p. 578 of the judgment his Lordship remarked thus:

> In our view, the correct approach to adopt in considering the priority dispute in this appeal is to apply general law priority rules, not forgetting s. 88 of the Land Ordinance and the concept of the bare trust doctrine in a vendor/purchaser situation.

And further down at p. 580 his Lordship went on to say this:

> In our view, therefore, it is too late now to question the applicability of the concept of the bare trust in a vendor/purchaser situation in Malaysia, though there is high authority to show that the concept, as enunciated by Jessel MR in *Lysaght v. Edwards*, would require to be applied in a modified form, so far as the question when the bare trust will arise is concerned, and it is to this question that we must now direct attention.

The question when the vendor of land becomes a bare trustee for the purchaser in Malaysia has not been uniformly answered by the old Federal Court, in the days when our apex court was the Judicial Committee of the Privy Council and this is reflected in a number of its decisions, to some of which we should now like to refer.

Thereafter his Lordship proceeded to refer to some of the cases which learned counsel for the plaintiff herein listed as representing another set of authorities on the same principle. Having done so his Lordship came to a clear conclusion at pp. 581-582 thus:

In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in *Ahmad bin Salleh*, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. *At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.*

We cannot, however, give unqualified approval to the view of Prof Visu Sinnadurai, found at p. 219 of his well-regarded book on *Sale and Purchase of Real Property in Malaysia* – which, it will be recalled, was the 'sheet anchor' of the judgment of the court below – that 'on the date of completion, if the vendor becomes a bare trustee, it operates retrospectively by conversion to the date when the contract was made' as this proposition, if applied universally, could cause considerable difficulties in the workings of the Torrens system of registration of title or even a modified Torrens system of land registration – as in Sabah – contained in a codifying enactment. Take this very case, where between the execution of the sale and purchase agreement and completion, the interest of the finance company chargee had intervened in the circumstances mentioned, so that to transfer into the law of vendor and purchaser, the law governing the rights and duties of trustees, statutory or otherwise, would give rise to considerable difficulties (per Jacobs J in *Chang & Anor v. Registrar of Titles* [1976] 8 ALR 285 at p 295).

A further factor which complicates the matter here is the position of the purchaser at the judicial sale, in whose favour a certificate of sale dated 26 February 1992 had been issued prior to the pronouncement of judgment on 25 April 1994, in the proceedings by way of originating summons by the purchaser under the agreement, which had been overlooked all round and to which we shall have to revert.

> Given these circumstances, no court would grant specific performance of the sale and purchase agreement aforesaid. The trustee/beneficiary relationship will not be applied in a vendor and purchaser situation where the contract of sale and purchase is not one of which a court would grant specific performance. (emphasis added).

With respect and in view of what was said by his Lordship Edgar Joseph Jr. FCJ I find no reason to agree with the contention of learned counsel for the plaintiff in the present case that an exception should be made to the pronouncement of the law as given in *Time Engineering*'s case *(supra)*.

Since it is not in dispute that there was no memoranda of transfer executed in connection with the two sales of the said property the inevitable conclusion is that the doctrine of bare trustee is yet to be attained. And I am inclined to agree with the submission of learned counsel for the 1st defendant that the least the vendors could have done in this case was to execute the memoranda of transfer in escrow regardless of the fact that the subdivision was yet to be carried out.

At best therefore the relationship of the plaintiff with HMC Sdn. Bhd. as well as that of HMC Sdn. Bhd. and HFR is one of contractual in nature at this stage.

Accordingly, there is therefore no merit in the first contention of learned counsel for the plaintiff as a basis to have the charges declared null and void.

I now come to the second contention which is that it was unconscionable for the 1st Defendant to have taken the said property as part of the security for the charges knowing well of its position at the material time.

Learned counsel submitted that the 1st defendant knew that HMC Sdn. Bhd. had interest over the said property since (i) the firm of solicitors which prepared the sale and purchase agreement between HFR and HMC Sdn. Bhd. was the same one that did the charges; and (ii) that HMC Sdn. Bhd. went into possession of the said property after the sale on 24 October 1983.

It was also submitted that by taking the said property as a security for the charges while knowing the interest of the plaintiff over it should be taken as a demonstration on the part of the 1st defendant to so deprive the title of the plaintiff in the event of the default by the 2nd defendant. With respect this second limb of the argument can be dismissed summarily in that there is clear evidence that the purchase by the plaintiff of the said property only took place on 2 July 1991 while the charges were registered on 15 February 1986.

In respect of the first limb of the contention it would appear from the documents that indeed the same firm of solicitors was involved in the two transactions. However there are two matters to consider here. Firstly what was the nature of the interest of HMC Sdn. Bhd. over the said property at that point in time and whether the mere fact that the same firm of solicitors was involved would impute knowledge upon the 1st defendant of the interest of HMC Sdn. Bhd.

Following what was held in *Time Engineering*'s case *(supra)* it is obvious that at that point in time the interest of HMC Sdn. Bhd. on the said property can best be described as mere contractual since not all the requirements had been satisfied which would have given it the beneficial interest over the said property and thereby making HFR a bare trustee. Thus in my view the use of a common firm of solicitors would not make any difference to the legal positions of the parties.

I am well aware that it has been held that in law knowledge of a solicitor is imputed upon the client. In the case of *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal* [1995] 3 CLJ 639 this is what his Lordship Gopal Sri Ram JCA said at p. 680:

> The second proposition which I accept as well settled is that the knowledge of a solicitor is regarded by the law as the knowledge of the client. The only exception to this is where the solicitor acts fraudulently *vis-a-vis* his client.

However in this instant case I do not think such a principle is relevant for the reason I have stated hereinabove. In any event the principle speaks of 'a solicitor' and not a firm of solicitors. And in the present case the evidence shows the position to be quite different. From the documents, namely, the sale and purchase agreement executed between HFR and HMC Sdn. Bhd. the solicitor attesting thereof was one Mr. Ting E Hang whilst the solicitor involved in the charges documents between HFR and the 1st defendant was one Mr. Paul Kan. These solicitors may or may not be from the same firm at the material time. Unfortunately there is no assertion which situation is the truth. Accordingly, I do not think the plaintiff can now rely on the principle of knowledge of a solicitor to be imputed upon the client.

Hence, this first limb of the contention also fails.

Finally, there appears to be an oblique reference in the plaintiff's case to collusion or even fraud as between the 1st defendant and the 2nd defendant (HFR). But I do not think that point has been taken seriously and rightly so as there was no clear assertion of such a fact and in the absence of such I should not consider it any further. At any rate it is incumbent upon

the party asserting fraud to prove it beyond reasonable doubt (see: *Southern Estate Sdn Bhd & Anor v. Tractors Malaysia Bhd* [1996] 4 CLJ 344). There has been no proof reached to that standard in this case.

In view of the conclusions I have arrived at I do not think it is necessary for me to consider in any details the other points raised by the respective learned counsel for the parties.

For the reasons hereinabove that this action of the plaintiff inevitably has to be dismissed with costs to be taxed unless agreed. However, since the main dispute involved only the plaintiff and the 1st defendant I therefore order that costs should only be awarded to the 1st defendant.